Supreme Court of the United States

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT

vs

C. WHEELER MANGUM,
SHERIFF OF FULTON COUNTY, GEORGIA
APPELLEE

Appeal from the District Court of the United States
for the Northern District of Georgia.

BRIEF OF

HUGH M. DORSEY,
WARREN GRICE,
COUNSEL FOR APPELLEE.

Chas. P. Byrd, Stat er, Atlanta.

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 775.

LEO M. FRANK, *Appellant*, *vs.* C. WHEELER MANGUM, *Sheriff*.	Appeal from the District Court of the United States for the Northern District of Georgia.

ABSTRACT OF CASE.

1. **Status of the case of the State of Georgia vs. Frank (insofar as same can be shown by reference to the record now before this Court) as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict; and a comparison of this with the allegations in the application for writ of habeas corpus.**

Frank, the appellant, appeals from the decision of the District Court refusing to issue the writ of habeas corpus, and by his petition and the exhibits thereto attached, discloses the following:

That on May 24th, 1913, the grand jury of Fulton County, State of Georgia, indicted him for the murder of Mary Phagan. (Record, page 1, paragraph 3.)

On August 25, 1913, a jury rendered a verdict of guilty. (Record, page 1, paragraph 3.)

On August 26, 1913, said Frank, in conformity with the verdict, was sentenced to death. (Record, page 1, paragraph 3; also page 9.)

On August 26, 1913, Frank filed a motion for a new trial. (Record, page 5, paragraph 7; and page 44.)

This original motion was amended, the 31st of October, 1913, on which date the same was over-ruled. (Record, pages 219 and 220.)

It will be seen by reference to the judgment of the trial judge, namely, Hon. L. S. Roan, which appears at the bottom of page 219 of the Record, that affidavits submitted by the State were considered, and the language of this said order of October 31st, 1913, shows, which is a fact, that said affidavits submitted by the State are not a part of the foregoing motion and amended motion, the grounds of which were approved by the court in an order on said page 219, immediately preceding the order over-ruling the motion.

Thereafter this original motion for a new trial was taken on writ of error to the Supreme Court of Georgia, and by said court on February 17, 1914, judgment was rendered affirming the lower court. (Record, page 5, paragraph 8.)

In said paragraph 8, page 5, Frank in his application for habeas corpus says:

> "The opinion of the Supreme Court of Georgia is reported in Volume 141, Ga., page 243, and the same is hereby referred to."

On page 38 of the transcript of the record in the opinion of the Supreme Court of Georgia dealing with Frank's "Motion to set aside the verdict" rendered, which said motion Frank refers to on page 5, paragraph 9, this said opinion of the Supreme Court of Georgia being attached by Frank as an exhibit to his application for a writ of habeas corpus, the following statement is made, namely:

> "And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank vs. State. 142 Ga. —— (83 S. E. —)"

So it appears from the application that two motions, one the ordinary and the other an extraordinary motion for a

new trial, were filed by Frank and decided by the Supreme Court of Georgia before the decision of the Supreme Court on his motion to vacate the verdict was rendered.

On April 16, 1914 (Record, page 5, paragraph 9), Frank filed a motion in the Superior Court of Fulton County, Ga., to set aside the verdict rendered against him, said motion being on grounds set forth in paragraphs 4th, 5th and 6th of the application presented to the District Court. The decision of the Supreme Court on this application is fully set out in the transcript of the Record, beginning on page 22 and ending on page 39. This decision by the Supreme Court of Georgia was rendered Nov. 14, 1914. (Record, page 5, paragraph 11.)

On November 18, 1914, the Supreme Court of Georgia denied Frank a writ of error to the Supreme Court of the United States. (Record, page 7, paragraph 17.)

November 21, 1914, application for a writ of error was made to the justice of the Supreme Court of the United States assigned to the Fifth Circuit, and on November 23, 1914, said application was denied, whereupon a similar application was made to another justice, and on November 25, 1914, denied, and then again to the entire court, which on December 7, 1914, denied the same. (Record, page 7, paragraph 18.)

Briefly the foregoing recounts in chronological order the steps taken in the case against Frank and by Frank, and shows the status of the case at the time the application for a writ of habeas corpus was presented to and denied by his Honor, Judge William T. Newman, judge of the District Court of the Northern District of Georgia.

Appellant's contentions are based on the propositions that his trial in the particulars indicated did not conform to due process of law as guaranteed by the Constitution of the United States, and are set out in his application (page 8) and further disclosed more fully by his assignments of error on the petition for writ of habeas corpus which appears in the Record beginning on page 17, and also by his

assignments of error as filed in this court as shown in the Record beginning on page 226, said contentions being that he is now held in violation of Section One of the Fourteenth Amendment of the Constitution of the United States because of disorder on the part of the public attending the trial, and because, his presence having been expressly waived by his counsel, he was not present at the reception of the verdict. This waiver is disclosed by allegations on page 3, paragraph 5.

BRIEF OF ARGUMENT.

Counsel for appellee desire to present to this court the exact status of the Frank case, insofar as the same can be shown by reference to the Record now before the court, as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict. (See page 22 of Record.)

In the amended motion for a new trial Frank submitted to that court certain grounds with reference to alleged disorder at his trial and asked the court to grant a new trial upon the same. In other words the following grounds of Frank's amended motion for a new trial dealt with and presented to that court as a basis for a new trial certain alleged acts of disorder on the part of the spectators attending the same, namely:

Ground 24 (Record, page 109).
Ground 38 (Record, page 117).
Ground 64 (Record, page 137).
Ground 65 (Record, page 140).
Ground 66 (Record, page 142).
Ground 75 (Record, page 147).

This application for a habeas corpus is based on almost identically the same allegations. (See paragraph 5, page 2.) The only difference between the questions submitted to the Courts of Georgia and the Federal Courts is that Frank

does not present to the Federal Courts as many grounds or as many instances of alleged disorder as he urged for a new trial in the State Court, but he has endeavored in his application to the Federal Court to enlarge his allegations as to the disorder with reference to the fewer instances which he does see fit now to present in this application.

We have already called the court's attention to the fact that the order of the trial court denying the motion for a new trial (page 219 of the Record) discloses the fact that the State by affidavits took issue with Frank with reference to certain grounds of his motion, and as a further evidence thereof the attention of the court is invited to the decision of the Supreme Court of Georgia, 141 Ga. 246, paragraphs 16 and 17 of the headnotes.

Also the court is invited to consider paragraphs 16 and 17 of the opinion in said case, said paragraphs to be found beginning on page 280. On page 280, in paragraph 16, the court says that "*rebutting proof was submitted by the State.*" It further appears from this opinion, and the paragraph cited, that only two instances referred to by Frank in his motion occurred within the hearing or knowledge of the jury, and this, furthermore, appears also from the grounds of Frank's amended motion as disclosed in the Record before this court. (See ground 38, page 117, and ground 65-c, page 141, and ground 65-b, page 141.)

No motion for a mistrial, it will be seen by reference to this Record, was ever made by counsel for Frank at the time said alleged disorder occurred, and where it occurred in the presence and knowledge of the jury.

Frank's counsel, as this Record now before this court discloses, never made any motion for a mistrial, where the alleged disorder occurred in the presence of the jury until sometime after the occurrence. In other words, when the alleged disorder of which they now complain occurred in the presence of the jury, they permitted it without then and there moving the court to declare a mistrial and without informing the court that the action which the court is

shown to have taken was insufficient, inadequate or unsatisfactory.

In other words, counsel for Frank did not at any time indicate to the court any dissatisfaction with the action that the court took at the time upon whatever complaint is shown to have been presented to the court, except in the two instances to which reference has been made.

The Supreme Court of Georgia, in 141 Ga. 280, paragraph 16, says:

> " . . . and presumably, from what otherwise appears in the Record, the action by the court was deemed satisfactory *at the time* and the orderly progress of the case was resumed without any further action *being requested.* The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment unless a ruling upon said conduct is invoked from the judge *at the time it occurs.*"

We will not cite the authorities relied on by the Supreme Court of Georgia but we will here propound this question to the Court:

Would this court, or would any court, have held differently with reference to such grounds?

Indeed, under the law would any court make a ruling to be followed as a precedent whereby a defendant in a criminal case would be permitted to do as Frank did, namely: make no motion, or express no dissatisfaction with what was done, spend about thirty days in the trial of a case, and then after conviction set aside the verdict?

And does not this court, from Frank's allegations and from the exhibits attached thereto, see that these matters could in no view of the law amount to a failure to give him a trial according to the law of the land?

We do not undertake to quote here all that is said by the Supreme Court of Georgia pertinent to these questions.

because we apprehend that the court will, for itself, read those paragraphs of the decision indicated.

On page 147 of the Record will be found ground 75 of the motion for a new trial. This ground dealt, among other things, with matters alleged to have occurred at the time when the verdict was brought in, and when Frank is shown not to have been present, as indicated by the following excerpt from that ground, to be found on page 148 of the Record, namely:

> "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel."

In connection with the allegations in the habeas corpus application, as found in paragraph 5, pages 2 and 3, paragraph 17 of the Supreme Court of Georgia, in 141 Ga. 281, is to be considered. In the first place this paragraph discloses that a request by Frank or his counsel, although he was absent, was made to poll the jury, and in the second place, it appears that the verdict was read and the polling had begun before the cheering began.

Passing from the allegations with reference to alleged disorder, let us see what the record shows concerning the failure of Frank to be present at the reception of the verdict.

In his application for a writ of habeas corpus, as we have previously shown in reference to another matter, page 3, paragraph 5, the following allegation occurs, namely:

> "He (the judge) requested my counsel to agree that I need not be present at the time that the verdict was rendered and the jury polled."

In ground 75 of his original motion for a new trial, on page 148 of this Record is found the following language, namely:

> "The defendant was not in the courtroom when

the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court," etc.

It will be observed that there is some difference between the two statements. With reference to this incident, as we have already suggested to be the case with reference to the alleged disorder, the allegations of the application are put much stronger in behalf of Frank than was the case when he made the allegations embodied in the motion for a new trial.

The purpose in quoting the language of the 75th ground of the motion for a new trial is, however to show this court that Frank at least had knowledge of the waiver at the time he filed his amended motion for a new trial.

We submit as sound the proposition embodied in the following excerpt from the opinion of the Supreme Court of Georgia on Frank's motion to set aside the verdict, as same appears on page 38 of this Record, namely:

> "The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law."

It appears from the Record, page 9, that he was sentenced on the 26th of August, 1913, the day after the verdict was rendered.

On page 282 of the decision in the 141 Ga., the Supreme Court of Georgia in discussing the deductions of Frank made from the allegations of fact set out in ground 75, says:

> "We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result."

This quotation shows on the face of this Record that the jurors trying the case completely and absolutely negatived the allegations which are now made in this application by Frank to the effect that they were improperly influenced contrary to the law and the evidence and their oaths.

Frank presented also an extraordinary motion for a new trial and the same was over-ruled and denied. (See page 38 of the Record in this case, and 142 Ga.; also 83 S. E. Reporter, pamphlet No. 2, page 233. This decision refers to the case in the 141 Ga. 243, 80 S. E. 1016). The extraordinary motion was decided by the Supreme Court of Georgia October 14, 1914.

It is not disclosed when this extraordinary motion was filed, but it was presumably filed before or certainly at the time the motion to set aside the verdict was filed. But in any event it had been decided previous to the decision of the Supreme Court, to be found in this record on page 22. On the 26th of August, 1913, when Frank was first sentenced (page 9); on the 7th of March, 1914, when he was sentenced again (page 10), no mention was made of his not having been present at the rendition of the verdict. And the first time that said absence is mentioned was April 16, 1914. (See page 5.)

In other words, for over seven and nearly eight months, during which time he had been twice sentenced, had made two motions for a new trial, he had never presented to the State Courts or to the Federal Courts any proposition claiming a lack of due process of law in that he was not present when the verdict was rendered.

It is respectfully submitted that this state of facts warranted and demanded the conclusions reached by the Supreme Court of Georgia in the opinion on the motion to set aside, beginning on page 22 of this Record. And we respectfully submit that from this Record facts are shown which under no view of the law could be held to have justified any decision other than the one rendered by the Supreme Court of Georgia, and it is respectfully suggested

that on this Record with reference to this question of the absence of Frank at the reception of the verdict this court will hold that he was not denied any right guaranteed to him under the constitution and will not hold that the court lost jurisdiction or that he was not accorded a trial according to the law of the land.

Appellant, in his application, page 2, 5th paragraph, says:

> "It was apparent to the court that public sentiment seemed to be greatly against me."

On page 147, in the 75th ground of his motion for a new trial, he says:

> "Public sentiment seemed to the court to be greatly against me."

In the State of Georgia it is provided by statute, now to be found in Code of 1911, Sec. 964, as follows:

> "*Venue, When and How Changed*": The defendant in any criminal case in the Superior Court may move by petition in writing for a change in venue, whenever in his judgment an impartial jury cannot be obtained in the county where the crime was committed. Upon the motion it shall not be necessary to examine all persons in the county where the crime is committed liable to serve on the jury, but the judge shall hear evidence by affidavits, or oral testimony, in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the solicitor-general and the defendant or his counsel, to be tried in the county agreed on. If a county is not thus agreed upon the judge shall select such a county as in his judgment will afford a fair and impartial jury to try the case, and have it transferred accordingly."

Later this statute was amended by the Act of the Georgia Legislature on August 21, 1911, to be found in Georgia Laws of 1911, pages 74 *et seq.*, providing that:

> "It shall be lawful for the judge of the Superior Court of the circuit in which a crime is alleged to have been committed to change the venue of the trial of the said case on his own motion, etc. . . ."

The Record no where discloses that Frank, though he was represented by several counsel, presumably in possession of a knowledge of the temper of the people of the community, ever made any motion to change the venue, and hence it is a fair inference that whatever antagonistic public sentiment, if any, was developed at the time the matters referred to in ground 75 of the motion occurred, was brought about and grew out of the character of the evidence and the case made by the State. Presumably, the judge did his duty, and presumably there was no antagonistic sentiment on the part of the public to Frank at the time he started into his trial, for had there been, presumably, the judge, under the authority of the statute cited, would have, of his own motion, changed the venue; and if not, then, presumably, the public sentiment, if any, claimed by Frank to have been manifest during the trial, was the natural outgrowth and consequence of the evidence adduced on the trial of Frank for the heinous crime of murder. Of course, we cannot go into the evidence adduced on the trial of Frank, because the appellant did not see fit to put it into the Record. But we do not deem it amiss to show from the transcript of the record made by Frank himself what the evidence of the State, when Frank was convicted, tended to show.

The Record now before this court shows evidence tending to prove—and indeed in view of the verdict ordinarily we would be authorized in insisting that it is conclusively proved that:

(a) Mary Phagan the deceased, was "a little girl" (See Record, page 129, ground 47).

"Mary Phagan would have been fourteen years old within a little more than a month, and was physically well developed for a girl of her age." (See 141 Ga., page 249).

(b) She was murdered and the evidence "tended to show that the sexual organ of the girl indicated external violence" . . . "From this testimony it was inferable that the slayer undertook to have some sort of relation or connection with her sexual organ, and possibly in an unnatural way" . . .

"A theory of the State, *which finds a basis in the evidence,* was that the murderer desired to have a sexual relation of some character natural or unnatural, with the deceased" (See 141 Ga. 125 and 156).

(c) "That Frank was the superintendent of the factory in which she worked. That he had previously endeavored to intrude himself upon the deceased" (See Record 129, ground 47).

(d) "That Frank was a man of general bad character for lasciviousness." (See Record, page 135, ground 56, and Record 144, page 70, and 141 Ga. 276.)

(e) "And that Frank was addicted to acts of perversion." (See Record, page 48 and ground 10 and Record, page 51, ground 13.)

The above citations showing the character of the evidence adduced on the trial of Frank have not been cited as we have previously indicated, to show this court his guilt, for this question, as we understand, is not before this court, but the purpose is to disclose that there was in the harrowing details of the crime much which was reasonably calculated to excite the indignation of law abiding citizens. If there were, as alleged, at this trial, which lasted nearly a month, isolated instances of disorder, would it be, the trial

occurring in a populous city (the constitution and laws of the State requiring it to be in public), any more than would naturally and ordinarily be expected. In each instance the court granted all the relief asked by counsel for Frank except to declare a mistrial.

2

2. Appellant is asking this Court to grant him a writ of habeas corpus which will virtually overturn his conviction in the State Court without submitting to the United States Courts important portions of the record on which the judgment is based, and on which he is being held.

In every motion for new trial a brief of the evidence is required. No motion for a new trial is complete without such copy of the brief of evidence.

Code of Ga. (1911) Section 6089.
"It is a part of the record." Code (1911) Sec. 6150.

It matters not that the grounds of the motion could be considered and determined without a reference to the evidence at all, or any part of it—the rule is the same; a brief of evidence cannot be dispensed with, and is a part of the motion.

Graddy vs. Hightower, 1 Ga. 253.
Roby vs. State, 74 Ga. 812.
Baker vs. Johnson, 99 Ga. 324.
Mize vs. Americus, etc., Co., 106 Ga. 140.
Holleman vs. Small, 111 Ga. 812.
Brooks vs. Proctor, 111 Ga. 835.

2

No brief of the evidence is attached as an exhibit to the application now before the court. The court therefore knows that the statement contained in the 7th paragraph of the application, on page 5 of the record, to the effect that a copy of the motion is exhibited herewith to the court, was not the complete motion.

And since in the order of the judge of the Superior Court overruling the motion for a new trial (see page 219 of the record), there is a recital that the judge considered affidavits submitted by the State; and since in the report of the case of Frank vs. State, 141 Ga. 243, and part on 141 Ga. 280 (this opinion being made a part of the record; paragraph 8 of the application, page 5 of the record) the judge distinctly states that rebuttal proof was submitted to the State on the hearing of the motion, this court knows that the entire record which the courts of Georgia passed on is not presented in Frank's application for habeas corpus.

Will not the Supreme Court of the United States indulge the presumption that attaches to the judgments and decrees of all courts of this character, to-wit.: that there was in these affidavits and in the brief of evidence facts which clearly justified the Superior Court and the Supreme Court of Georgia in its rulings, and when it appears, as it does from this application, that Frank is held under a judgment of the State court not void on its face and his application further discloses that the entire proceedings are not presented in his application for habeas corpus, will this court order a writ to issue based on such parts of the record of his conviction as he chooses to present to the court?

The Supreme Court of Georgia is second to no State in according trials free from hostile demonstrations—and has gone as far, we venture to assert, as any State in the union in setting aside verdicts where the same were influenced by hostile demonstration on the part of spectators.

Lang vs. Hopkins, 10 Ga. 37.
Monroe vs. State, 5 Ga. 139.
Mitcham vs. State, 11 Ga. 616.
Anderson vs. State, 14 Ga. 712.
McGuffie vs. State, 17 Ga. 497.
Martin vs. State, 38 Ga. 296.
Nesbit vs. State, 43 Ga. 238.
Hunter vs. State, 43 Ga. 516.

Westmoreland vs. State, 45 Ga. 279.
Stewart vs. State, 58 Ga. 577.
Hudgins vs. State, 61 Ga. 182.
Moon vs. State, 68 Ga. 696.
Turner vs. State, 70 Ga. 778.
Flanagan vs. State, 106 Ga. 109.
Turner vs. State, 111 Ga. 217.

In Georgia, it has frequently been held, that where a party does not have a fair and impartial trial, in the manner contemplated by law, which is guaranteed to him by the State Constitution, as well as the Constitution of the United States, no matter how strongly the evidence shows his guilt, it must for this reason be set aside and a new trial granted.

Daniel vs. State, 56 Ga. 654.
Smith vs. Lovejoy, 62 Ga. 373.
Woolfolk vs. State, 81 Ga. 551.
Collier vs. State, 115 Ga. 803.

But this is far from holding that whenever an accused *alleges* those things in a motion for new trial, the court should grant a new trial. Under our practice, a movant can *allege* as reasons why he contends a new trial should be granted him, whatever facts he pleases; but the State is permitted by affidavits to make a counter showing, and then the court that passes on his motion becomes as to such disputed facts a trior; and this was what was done in Frank's case. See the opinion of Mr. Justice Atkinson, 141 Ga., page 280.

3. The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the State Court the effect of his absence when the verdict was received was not the passage of an ex-post-facto law, but followed prior decisions.

On page 6, Paragraph 12, appellant says that:

"Under previous decisions of the Supreme Court of Georgia and under the practice which had prevailed throughout the State prior to the aforesaid decision rendered in my case November 14, 1914, as aforesaid, the proper procedure to attack as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial was treated as not being a proper remedy."

We submit that this allegation is incorrect. We cite as against the word of appellant as above quoted the decision of the Supreme Court of Georgia as appended to his application, said decision beginning on page 22. But we invite counsel for appellant to produce any Georgia authority, *where the question was presented,* sustaining this claim.

On the other hand we will endeavor, by citing the decisions of the Supreme Court of Georgia, to convince the court that it has nowhere been held as Frank contends, but that all the previous decisions of the State Courts were in harmony with and supported the decision rendered by that court in reference to Frank's particular motion to set aside the verdict.

We therefore now discuss the Georgia decisions and the motion to set aside as it was presented to the Supreme Court of Georgia when they rendered the decision embodied in the transcript, for this court from this Record has before it certainly enough of what appeared to the Georgia Supreme Court to demand the same conclusion.

In

115 Ga. 232; Regopoulos,

it is decided that the fact that the list of witnesses, on whose testimony a charge against defendant was founded, was not furnished in response to the demand of the accused but an incorrect list instead was furnished, is not ground for a motion in arrest of judgment.

The attention of the court is called to the fact that under the Constitution of Georgia, Article 1, Bill of Rights, section 1, paragraph 5, it is said that every person charged with an offense against the laws of this State shall on demand be furnished with a list of the witnesses.

We think that had Frank moved in time—i. e., during the term—by a motion to set aside or vacate the verdict, which would have been in the nature of a motion for a new trial, and governed by all the rules of said motion except as to a plea of former jeopardy, he would have made a motion recognized perhaps by the laws and which, if sustained under the facts and the law, would have enabled him to have set up on a second trial former jeopardy.

50 Ga. 272, Prescott vs. Bennett.
30 Ga. 191, (3) Lucas vs. Lucas, also page 206.
109 Ga. 359, Mize vs. Am. etc.

Undoubtedly he could have made this question in a motion for a new trial.

We insist that to have granted him a new trial on this ground, had the facts warranted the same, would have given him all the rights to which he would have been entitled.

We contend that after the term and after an adjudication on his case in the Supreme Court, he would not have been permitted to make this question, here presented, by habeas corpus.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 66-7, Griffin vs. Eves.
126 Ga. 536 (1) McDonald.

Having sought and obtained an adjudication in that court he is precluded. The adjudication of the Supreme Court of Georgia, in other words, procured by Frank, now prevents any such proceeding.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 65, Griffin vs. Eaves.

All matters which could have and properly should have been incorporated in a motion for a new trial are presumed to have been,

138 Ga. 740, Leathers vs. Leathers.
116 Ga. 596, Regopoulos.

Here the same case which was brought to this court on "motion in arrest," which was denied, again appears in the shape of "a motion to set aside," and the court in the first headnote said:

> "In obedience to rulings heretofore made, it is held that a motion to set aside a judgment, like a motion to arrest it, must be predicated on some defact, apparent on the face of the record. The two differ only in respect of the time at which each must be made."

The second headnote says:

> "It follows from the foregoing that a motion to set aside a judgment in a criminal case upon the ground that the accused had, upon demand for a list of the witnesses upon whose testimony the charge against him was founded, been furnished with an incorrect list, was properly overruled."

This case cites several decisions and is undoubtedly the law, affirming previous decisions, and the principle involved in this case never having been disturbed or questioned, except in a headnote decision in the 126th Ga., page 536, McDonald; the second headnote of which we confess our inability to harmonize and reconcile with the Regopoulos, in the 116th Ga., as we understand it.

But we cite the first headnote in

126 Ga. 536, McDonald,

as an authority consistent with the contention of the State in this case, because while the court in this headnote 1, refers to a judgment, it clearly shows that what they were considering, and what was being dealt with to set aside, was a *verdict*.

Some of the decisions in line with the Regopoulos, in both the 115th and the 116th Ga., which recognize those decisions and decide the law in conformity therewith, rendered since that decision, are as follows:

121 Ga. 40, Leffler & Son vs. Union Compress Co.

This case was twice before this court, the second time in 122 Ga., page 640. These two decisions, in our opinion, make the distinction clear. In 121 Ga. 40, the court rules in the first headnote as follows:

> "A motion in arrest of judgment must be predicated upon some defect, not amendable, which appears on the face of the Record."

Now in 122 Ga. 640, Union Compress Co. vs. Leffler & Son, an amendment, probably not objected to, was filed. See headnote 7, and on page 641, under the statement of the case the following, "On the return of the remittitur and before it was entered in the court below, the garnishee offered a written amendment wherein it alleged that the judgment in the garnishment case was void because the record therein disclosed—" etc., but note in the opinion by Judge Lamar this language, namely: "Judgments of every court of record may for good cause be opened, vacated or amended during the term."

These two cases establish, in our opinion, the two propositions for which we contend in this case, namely: that judgments, as is decided in the second headnote of the 122d Ga. 640, can be arrested during the term or set aside on motion after the term only for defects appearing on the face of the Record, but as stated by Judge Lamar, the court may

open, vacate, or amend, etc., *during the term.* In other words, these decisions show that the courts always make a distinction between motions made *during the term* and those not made until after the term, and they make a distinction between motions under 5957, based on the Record, and motions made under 5965, which refers to motions predicated on matters dehors the Record, and which said motions under section 5965, while they need not necessarily always be made during the term are nevertheless when made governed and controlled by principles to which we will hereinafter refer and which do not obtain in the instant case.

117 Ga. 501, Tietjan vs. Merchants National Bank.

The first headnote says: "A motion to set aside a judgment must be based upon some defect apparent upon the face of the record."

A similar case is 3 Ga. A., 178 and 184, Drought et al. vs. Pooge:

120 Ga. 578, Ayer vs. James.

The first headnote here is identical with the Regopoulos, and please see the second headnote, which is an authority for the proposition contended for by us, viz: that no matter what you may designate the motion, the court decides for itself, from the motion, what it really is.

We particularly invite the Court's consideration of the opinion by Justice Evans.

We also desire the court to note in this decision on page 582, that it appeared that "later on, on the same day, within an hour after the verdict was returned, James went to consult other counsel who *immediately prepared and presented* to the court the motion hereinbefore set forth," and Justice Evans says, to use his language: "The trial judge might well in the exercise of the *wide discretion* with which he is vested, have passed an order reinstating the case for a trial on its merits."

In other words, the motion to vacate the verdict must clearly have been made during the term, when the court was possessed of a power over both judgments and verdicts rendered, of which power the closing of the term would divest him.

1 Ga. App. 673, Georgia Railway & Electric Co. vs. Hamer; (the citations in headnotes in 1 and 2).
139 Ga. 597 (1), Moore vs. Moore & Cochran.

Of course the power of the court in the term as to judgments is to be differentiated from the court's power with reference to verdicts.

This proposition, that judgments are "in the breast of the court" during the term, is applicable alike to criminal as well as civil practice. See:

28 Ga. 235, Jobe.
53 Ga. 54, Este vs. Ivey (page 2 of opinion).
124 Ga. 912, Philips vs. Philips.
141 Ga. 799 (1), Tate vs. Little.
109 Ga. 798 (2), Moore vs. Kelley.
127 Ga. 24, Rawlins vs. Mitchell.

This case not only sustains the Regopoulos case, but stresses the fact that the motion referred to was presented at a *term subsequent* to the term at which the judgment was rendered, and after an *affirmance by the Supreme Court of Georgia* of a judgment overruling a motion for a new trial. In reference to this Rawlins case the court's attention is called to the fact that there was a verdict of guilty.

124 Ga. 31, Rawlins.

In

129 Ga. 292, Ford vs. Clark,

will be found another case. This is a case brought under section 5965, the equity section, of the Code. In the first

headnote stress seems to be put on the time at which the motion was brought, because of this language used, namely:

> "*The motion being made at the term of the court at which the verdict and judgment were entered,* and the movant showing that he was not in laches."

Judge Evans, in this case, recognizes the principle in the Regopoulos cases, but holds that for fraud, etc., a motion may be made predicated on facts dehors the record.

Our idea of the law is, that under section 5965, motions, under proper allegations as to the facts, and especially as to diligence, etc., might be brought after the term, but we do believe that it is essential, no matter what kind of a case it is, that *diligence* should always be made manifest.

See the opinion of the Court on page 295, paragraph 2.

On page 292 occurs the following statement, namely:

> "During the same term the defendant filed his motion to vacate and set aside *the verdict and judgment,—*" etc.

hence, here again, is a case where the court uses the word "judgment" embracing, as we contend, the word "verdict" also, though it will appear that the motion made referred to both the *verdict and the judgment.*

See also

119 Ga. 177, Williams vs. O'Neal, et al.

Here the Regopoulos case and others referred to by us are cited and approved.

See also the headnote under decision in

119 Ga. 615, Sweat vs. Latimer.

In

139 Ga. 597, Moore vs. Moore & Cochran,

is to be found another decision where a verdict and judg-

ment obtained by fraud, etc., were, where the movant was shown to have been diligent, set aside. Here, it will be noted, the motion referred to verdict and judgment both. This case followed after cases like Ford vs. Clark, 129 Ga. 292.

See also

139 Ga. 81, Worthy vs. Farmers Life Confederation.

We could cite other decisions since the 116 Ga., Regopoulos, but do not think that it is necessary to do so.

We did not discuss or refer to decisions prior to the Regopoulos cases, and which were cited in these decisions, but we now desire to refer to one or two cases prior to that decision.

108 Ga. 572, Longman et al. vs. Braidford.

This decision is referred to on page 592, 116 Ga., Regopoulos, where the court says that the point as to the remedy pursued does not appear to have been made, but if made this case must yield to rulings made in earlier decisions, which are cited.

From the headnote, however, it appears that the court in the case in 108 Ga. 572, considered the question as to *when* the proceedings were made. He pointed out that they must be "timely."

In

92 Ga. 440, Clark's Cove Guano Co. vs. Steed,

a verdict was involved and the motion was predicated on aliunde grounds.

In

109 Ga. 359, Mize v. Americus Mfg. & Improvement Co.,

the court holds that a motion to set aside a judgment on

the ground that one of the jury by whom the *verdict* upon which the judgment was rendered was returned, was disqualified, could not be sustained, but that the remedy in such a case was to make in due time a proper motion for a new trial.

In connection with this discussion, we will refer the court to

53 Ga. 136, Nolan, and to the same case in
55 Ga. 521.

There is nothing, as we understand these decisions, which should conflict with the position of the State, but on the other hand the State insists that on more than one question in this case these decisions are authorities for the State. In the first place they recognize the right of waiver on the part of the counsel and the defendant. That matter, however, is to be considered hereinafter.

The question presented in the Nolan case in the 53d Ga., as we understand the same, was simply as to whether or not the questions involved can be presented by a motion in arrest of judgment. The court held that it could not be made by motion in arrest. This decision was rendered in 1874.

The only proposition which the court was called upon to pass on in that case was whether or not a motion in arrest of judgment was the proper remedy, and the court said that it was not and sustained the lower court in refusing to release the defendant. Now Judge Warner, in the third headnote of this decision, went further than was necessary to a decision thereon and threw out the suggestion that the matters involved, being a fact extrinsic to the record, might be gone into on a motion to set aside the verdict.

In the first place, this was obiter. In the second place, if it be good law it must necessarily mean that Judge Warner contemplated such a motion *timely made during the term,* in a case where there was no ratification, acquiescence, waiver or estoppel.

Now the case again appears in the 55th Ga. 522. Presumably the lower court, acting on Judge Warner's obiter in the third paragraph of the decision in the 53d Ga. 139, went ahead and set aside on motion the verdict, and it is probable that no objection whatsoever was made thereto. Had there been objection, we submit that the court because such a motion to set aside was certainly made *beyond the term* at which the verdict of guilty was rendered, would have refused to set the same aside. But if that is not true, certainly the court would not have set aside the verdict had Nolan, *by a motion for a new trial not making this point,* made in these two decisions, treated the verdict of guilty as otherwise regular, legal and binding.

The decision in the 53d Ga., was undoubtedly technically correct. In this day and time, however, under the decisions in the Ford case, 129 Ga., and previous decisions referred to, the Georgia court probably without much reference to the technical designation of the motion would go to the merits of the controversy and treat the technical motion to arrest as a common-law motion to vacate or set aside in the nature of a new trial, *if it had been made during the term,* and would grant, probably, had there been no waiver or ratification, etc., the relief sought.

But, be that as it may, the decision in the 53d Ga. was right. The matter of law decided, and the law as laid down in the 55th Ga. is not now involved in any phase of this case, but the court's attention is called to the fact that both of these cases constitute strong authorities for the position of the State in this case on the question of counsel and client waiving their rights.

The Nolan case in the 55th Ga. 521, merely decided that on the second trial of the case, where the verdict had been set aside by the court and rendered null and void, the defendant could not be put in jeopardy a second time.

This, and this alone, was all, as we understand the case, that was decided. It seems to us to follow as a natural sequence and a logical conclusion that if the court had really

adjudicated that the verdict should be set aside, then the plea of former jeopardy should have been, as it was, sustained.

The Fannin case, 54 Ga. 476, while probably overruled in

128 Ga. 463, Franklin County vs. Crow (citations)

and not adopted as to other matters, (116 Ga. 597, Regopoulos), yet contains, in the opinion of Judge McCay, on pages 478, 479 and 480, expressions compatible with the State's position here presented.

In passing we will also call the court's attention to the fact that the last paragraph of the headnote shows that the court in dealing with the motion presented in this case, considered the doctrine of *estoppel and waiver and applied it.*

A decision by the Court of Appeals is to be considered, viz.:

7 Ga. App. 50, Lyon vs. State.

It is very apparent that Judge Hill, by whom Frank's motion on this petition was heard, and who rendered the opinion for the court in the Lyon case, did not, when he wrote the second headnote of the decision, have in mind the decision of this court in.

119 Ga. 396, Cawthon.

This is a strong case. The opinion written by Judge Cobb sustains the State's contention as to the right on the part of the defendant or his counsel to waive certain matters.

It will be noted that in the first headnote of this opinion the court said:

> "The defendant in no manner waived either his own right to be present in person or his right to have his counsel present when the verdict was rendered."

However, we are not now citing this case on that phase of this Frank motion.

We cite 7 Ga. App. 50, Lyon, as an illustration with reference to the method of procedure adopted which we are now considering. Judge Hill, in the course of his opinion on page 52, says that this petition *was filed at the term at which the verdict was rendered.*

Judge Hill further, in paragraph 1, on page 52, differentiates this case from the Regopoulos, 116 Ga. 596, and puts it under Ford vs. Clark, 129 Ga. 292. Our idea is that Judge Hill rendered the right decision with reference to the matter considered in the Lyon case, but gave the wrong reason therefor. The Regopoulos case was not controlling. The reason it was not controlling was because the matters dealt with in the Lyons case were brought to the attention of the court *at the term at which the verdict was rendered.* The decision of the Court of Appeals in this case, we submit, should have been in principle put upon the broad proposition that the *motion was made at and during the term, and that the motion was in the nature of a motion for a new trial.* It should never have been put under the case of Ford vs. Clark, 129 Ga. 292, and other kindred cases, because those are cases where the right of action was predicated on the section of the Code hereinbefore referred to, which permits the court, where fraud, etc., has been shown, to set aside verdicts, *after the term.*

In the Regopoulos case in the 115 Ga. 232, it will be noted that the accused moved to rule out certain testimony, asked for the direction of a verdict of acquittal, and asked for a discharge, which motions were refused, and that he did not at any time ask to have a mistrial declared. In the 115 Ga., Regopoulos, the defendant, having failed to timely move for a mistrial, *waived that right.* It will be noted in this case in the 115 Ga., that Regopoulos had also made a motion for a new trial, which was overruled, and which was expressly abandoned, and hence this conduct constituted a waiver. And, therefore, when the Regopoulos case in the 115th Ga. got up to the court it was one involving,

just exactly like this Frank case did, a technical question, pure and simple. And remember that the Regopoulos case in the 116 Ga. came up on a motion made *after the term and after* all these matters referred to in the 115 Ga., Regopoulos, had transpired.

Hence we say that the Court of Appeals, in the Lyon case, in the 7th Ga. App., did right to differentiate that case from the Regopoulos case, but fell into error in trying to analogize the matter presented to the other cases referred to in the opinion. Our position is that it should have been dealt with by the court as a motion *made during the term,* and to use the language of Judge Hill, as "a petition to vacate and set aside a verdict."

We think also that Judge Hill was wrong when he used the following *obiter* on page 53, viz.:

> "We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. . . . The error is hardly one that would be properly made in a motion for a new trial," etc.

This question was not involved or necessary for a decision of the Lyons case.

In 13 Ga. App. 440, Miller, a similar matter was dealt with in *a motion for a new trial.*

In 13 Ga. App. 135, Bentford vs. Shiver,

will be found several expressions, both in the headnote and in the body of the decision, which support our contention. See headnote 2, page 136. In the body of this headnote this language is used, viz.:

> "A judgment which depends entirely upon the fact that the court erred in refusing a continuance, may, upon a proper showing, be set aside for this irregularity, just as a judgment obtained by fraud or by perjury may be set aside upon a *timely* and

proper motion filed *at the term* at which the judgment was rendered, though neither perjury nor fraud appears from the record."

We do not believe that so far as fraud or perjury are concerned it is necessary to make the motion at the term. However, in headnote 3, it appears that this motion considered in Bentford vs. Shiver was filed *at the term at which the verdict was rendered,* and the movant showed that he was not in lache, etc. See also the opinion of the court on page 138. The case of

Mobley, 9 Ga. 247,

referred to, was a case under the equitable section of the code, and if we understand, as we said with reference to the decision of Judge Hill in the Lyons case, the court, in writing this opinion, 13 Ga. App., confused the law as contained in the Ford case, in the 129th Ga., and the Mobley case.

In the closing paragraph of this decision, on page 139, however, the judge rendering the opinion says:

> "Whether the rule would apply after the adjournment of the term at which judgment was rendered or not, we are clear that *during the term* at which it was returned the proper motion might be filed—and the judgment might be set aside."

Thus it was that the court in this opinion almost made the distinction for which we contend. Clearly, if the motion then being considered in this case was one that came under the principle set out in Mobley, Ford, Union Compress Co., Ayer vs. James, and other decisions, the court would have had no doubt about such a motion being brought subsequent to the term at which verdict or judgment complained of were rendered.

We have several times in this brief made reference to the fact that what is sometimes called a motion to set aside

for matters extrinsic to pleadings or record, are to be likened unto motions for new trial, and substantially are the same in form and effect.

This proposition is virtually stated in the language of Chief Justice Warner on page 272 of the 50th Ga., Prescott vs. Bennett.

In this connection see:

60 Ga. 353, Dugan vs. McGlann.

With reference to the

67 Ga. 604, Turner vs. Jordan,

it is only necessary to call the court's attention to what is said by Judge Cobb in the Regopoulos case, 116 Ga. 597. In other words, if that case is not taken out of the general rule, as indicated by Chief Justice Jackson, in Dugan vs. McGlann, 60 Ga. 353, it is then clearly in conflict with the earlier decisions.

6 Ga. App. 403, Hopkins vs. State.

Here the sheriff permitted the jury to disperse and the defendant was released. On page 404 it appears that "*before the adjournment of the court the defendant* filed a motion for a new trial, . . . and also *filed a motion for his discharge* upon the ground that he had once been placed in jeopardy."

It will be noted that the court in the second headnote says that this amounted to a mistrial declared without the consent of the defendant, under the facts obtaining.

We deem it unnecessary to further cite authorities because we believe that whether we are right or not the foregoing citations, in conjunction with what we have said, make plain our position.

We will here briefly re-state the same:

Frank could have made this point in a motion for a new trial. He could have under the authorities cited probably

made it by a motion to vacate and set aside the verdict, had such motion been made *at and during the term*, and before he *had acquiesced, ratified* and *waived* whatever rights he had, and he could have made the point before an adjudication on his original motion in this court, by habeas corpus.

79 Ga. 785, Daniels vs. Towers.

Having failed to timely move, he is precluded.

We do not believe that the equitable section of the Code gave to him any right whatsoever. See:

7 Ga. 422, State vs. Jones,

where it is said that even the State might have a writ of error when the acquittal of the defendant is affected through his fraud, or misconduct, citing 1st Chitty's Criminal Law, page 657.

But if it should be held that it did give him a right, then, as hereinbefore indicated, said right was coupled with the equitable corollaries as to moving timely, not waiving anything, etc.

93 Ga. 793, Reab vs. Sherman.
Secs. 4358-4359, Code of 1911.

We believe that no case will be found in the books not in entire harmony with the position assumed by the State in this case, and on the other hand we do not believe that the contention of Frank could be entertained without doing violence to well-established principles of law already definitely laid down. And we believe that while it is essential to give every defendant all constitutional rights guaranteed to him when they are not waived, still we also believe that for the good of society and in the interest of government, and the due administration of the law, it is more important that there should be always timely presentation of such questions as are here made, and that the movant who seeks a strict legal enforcement of the constitutional guaranties should come into court, in asking protection under the law, in strict conformity with the law.

We have not encumbered the record with the citation of foreign authorities on this proposition because it is one involving our State practice, but we will state that the authorities in other jurisdictions are all to the effect that verdicts and judgments rendered *during the term* are on a different footing, as to being set aside, than *after the term.*

We pass now from the questions of procedure.

4. A brief discussion of the decision of the Supreme Court of Georgia on the merits.

It appears that the agreement of counsel that Frank not be present at the reception of the verdict was made in the interest of Frank and for his protection; it appears that the jury *was polled,* and polled under an agreement with counsel when they made *their waiver.*

We submit that it would be impossible to find in the books or imagine a more complete case of *waiver, estoppel, ratification* and *acquiescence* than is here presented.

We submit that it has been practically decided *on principle* in every decision in the Supreme Court of Georgia, and in the Court of Appeals, that the defendant is possessed of such right. If it be considered in this matter that originally counsel would not have the right to have waived this defendant's presence, still if there is any such thing in the criminal law as ratification, acquiescence and estoppel, it is applicable under the facts here presented.

These decisions all show that Frank was treated as have been all others.

The United States Court decisions are all predicated on special statutes and a peculiar practice obtaining whereby the prisoner immediately upon entering upon his trial is taken into custody by the marshal. But it is very probable that this court, were this still an open question in this

form, would decide the question differently. This is indicated in the case of:

Garland vs. State of Washington,

to be found in the U. S. Supreme Court Advance Opinions published in Pamphlet 10, April 15, 1914, page 456.

Among other things, the court, in discussing the technical proposition submitted in this case, which was analogous to the proposition here submitted, says:

> "Technical objections of this character were undoubtedly given much more weight formerly than they are now."

As showing the attitude of this court toward waivers on the part of the defendant, the following language is important, viz.:

> "He ought to have been held to have waived that which under the circumstances would have been an unimportant formality. A waiver ought to be conclusively implied, where the parties had proceeded as if the defendant had been duly arraigned—," etc.

Further,

> "It would be inconsistent with the due administration of justice to allow a defendant to lie by and say nothing as to such an objection," etc.

This decision is also to be found in
34 Sup. Ct. 456,

and a discussion of this case will also be found in Volume 78, Central Law Journal, page 311, Pamphlet No. 18.

The United States Court rules are different from Georgia's, in that the record must show affirmatively the prisoner's presence.

36 U. S. Supreme Court, 1011 (note), Lewis vs. U. S.

The Federal courts, in determining the question as to cases arising in the Federal Court, make their own interpretation, etc., but in determining a question of due process of law in cases arising in State courts, they apply the State's interpretation of the meaning of due process of law.

92 U. S. 90 and 93 (book 23, page 678), Walker vs. Sauvinet.

In the cases of *Lewis* and *Hopt,* cases which were cited and probably will be again cited here, are just as much authorities for the proposition that the presence of the defendant should appear on the record as they are with reference to the proposition of due process of law.

But in the Rawlins case, in the 127th Ga., and other Georgia cases, the court holds that such matters do not have to appear of record.

What is due process of law is regulated by the State, and the Georgia authorities, which are controlling, have on many questions held the reverse of the United States Court.

119 Ga. 395, Cawthon.
51 Ga. 567, Martin.

This case recognizes the right of waiver in criminal cases.

96 Ga. 431, Tiller.

What is due process of law in the States is regulated by the law of the State.

92 U. S. 90 and 92, Walker vs. Sauvinet.
169 U. S. 586; 42 L. Ed. 865 (2), Wilson vs. N. C.

Due process of law, within the meaning of the 14th Constitutional Amendment, is secured if the laws operate on

all alike, and do not subject the individual to an arbitrary exercise of the powers of the government.

148 U. S. 657 and 662, Giozza vs. Tiernan.
136 U. S. 436, In Re Kemmler.
96 U. S. 97, Davidson vs. New Orleans.
187 U. S. 51, Turpin vs. Lemon.
110 U. S. 516 and 558, Hurtado vs. People of California.
199 U. S. 434; 50 L. Ed. 260, Rogers vs. Peck.
177 U. S. 231; 44 L. Ed. 748, Louisville & Nashville Railroad Company vs. Schmidt.

We will cite a few of the cases decided by the Georgia courts where the doctrine of waiver and ratification is recognized and applied in criminal cases.

In 119 Ga. 395, Cawthon, we have a case which sustains the State.

The 9th headnote is conclusive of this case.

It appears from Frank's petition that his counsel made a waiver of his presence. It appears that he ratified the same and allowed the court to act upon the waiver after he had notice that the same had been made.

The law of Georgia is set out in the 9th paragraph of the headnotes, and it is to the effect that before a verdict received in the absence of the accused will be held to be invalid it is incumbent upon the accused to show . . . that he did not ratify the same or *allow the court* to act upon the waiver of counsel after he had notice that the same had been made, both of which Frank did.

The opinion of Judge Cobb covers the propositions involved in the instant case, and the authorities cited are incorporated hereby in our brief. We content ourselves with quoting the following from Judge Cobb's opinion, to be found on page 413, viz.:

> "It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act."

The Nolan cases in the 53d and 55th Ga. Rep., hereinbefore cited, recognize and apply the doctrine of waiver. Indeed the whole question grew out of a waiver on the part of the counsel which the Court seemed to treat as valid.

The decision in the 55th Ga. 521, headnote 3, recognizes the right of the prisoner to consent.

Able counsel representing Nolan in that case seemed never even to have suggested for the court's consideration that *they did not have the right to make for their client a waiver,* and there was no question of waiver like we have here at all involved in this Nolan case, because it was not contended that Nolan himself or his counsel agreed that the verdict should be returned during his absence on the day it was rendered. The only agreement made was with reference to what should be done with the verdict "*that night.*" No agreement whatsoever was made that a verdict should be brought into court the *next day,* in the absence of the defendant and his counsel, which happened, and out of which grew these cases.

That is a wholly different proposition from the matter here presented.

See

59 Ga. 514, Smith.

This recognizes his right of consent. The court is respectfully referred to Justice Bleckley's opinion on page 515.

51 Ga. 567, Martin,

recognizes the right of waiver, but says, with which position we take no issue, that it must be "*a clear and distinct waiver.*"

We submit that the law as to that is correct and that the facts involved in the case make, under the allegations of this petition, a very clear and distinct waiver, and an un-

usual and unmistakably clear case of ratification and acquiescence.

In

87 Ga. 583, Wilson vs. State,
Judge Bleckley cites the case of

12 Ga. 25, Wade.

The decision in the Wilson case was right because to use the language of the Judge in this opinion:

> "There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial."

This decision indicates that if there had been anything to indicate such intention it would not have been illegal. And the Wade case, in the 12 Ga. 25, cited by Judge Bleckley in this case, says, in the second headnote, that it is error to do certain things *without the consent of the prisoner's counsel.*

Thus again it would appear that as far back as the 12th Ga., similar questions were dealt with and without any suggestion from the court that in this jurisdiction matters like this could not be waived.

In

96 Ga. 430, Tiller vs. State (1)

the decision is predicated under the facts, on the proposition that there was no *waiver, express or otherwise, either by himself or his counsel.*

Thus it would appear that the court, in 1895, recognized the right of waiver.

When the accused is on bail, he is presumed by virtue of his voluntary absence from the courtroom, to have waived

his right to make any objection to the validity of the trial, because of his absence, etc.

On principle, we submit, there is no difference, where the defendant is on bail and is presumed to have waived his rights, and a case where those rights are waived when he is in the custody of the law. It all depends on whether or not there was a waiver.

13 Ga. App. 440, Miller.

Headnote No. 2, in sub-paragraph 2, shows a clear case of *waiver*. On page 445, the Court of Appeals, cites several decisions of the *Supreme Court* where the defendant waived by *his silence and failure to make timely objection*, certain rights, and says:

> "Many rights involving a fair and impartial jury trial may be waived, either by the *conduct of the accused*, or *his counsel, or by their silence.*"

Then follow certain pertinent citations, and then:

> "The accused and his counsel should not be allowed to take their chances of a favorable verdict with knowledge of an irregularity, and after losing set up such an irregularity as a ground for a new trial."

Now if that be, as we insist it is, a sound proposition of law, then is it not equally sound to say that where a defendant treats a verdict as legal and binding, by a motion for a new trial, and again in a second effort by the unusual method of an extraordinary motion, he must necessarily be held as waiving all points which he could have made, but failed to make?

In the same opinion Judge Russel says, citing a Supreme Court decision as authority, "that one accused of crime can waive any of his rights or all of them, and where he remains silent and takes the chances . . . he cannot after . . . ask that that right be accorded him."

And Judge Pottle, in the same case, concurring specially, says that this case in the 13th Ga. App., is different from the Hopson case in 116 Ga. 90, in that in the Miller case counsel "sat silent and for eleven hours with knowledge," etc.

In our case counsel were unusually active and vigilant in pressing motions which dealt with the verdict as legal and binding, except in the particulars indicated in this application, and thus by their conduct necessarily known to Leo M. Frank they have in the most incontrovertible and indisputable manner precluded their client.

136 Ga. 67, Richards.

In this case defendant's attorney absented himself voluntarily. There was no suggestion of any waiver except the implied waiver by the voluntary absence. Defendant was in court, but no other counsel were appointed. The reception of the verdict under those circumstances was complained of in a motion for a new trial, but the court declined to set the verdict aside.

The court gives the wrong citation in the 135th Ga. It should be 135 Ga. 654, Roberson.

In

129 Ga. 170, Bagwell (1)

the court uses this language: "*after the consent of the accused.*"

It is held here that where a mistrial has been properly declared the prisoner may be again tried (see authorities on page 174 in this Bagwell case). We submit that hardly in the history of the State has it ever been imagined by any attorney at the bar or judge presiding that counsel would not have the right to agree with the court to declare a mistrial. The court would conclusively presume authority to do so.

If any other doctrine than that should be established, instead of courts relying, as they have always done and

do now, upon the integrity of counsel representing the defendant and upon said attorney's judgment to do what is best for the defendant, the court would establish a rule which would necessitate that the word of counsel as to the conduct of the case would not be accepted or acted upon and thus a law would be enforced which would not only unnecessarily hamper and delay the expeditious handling and disposition of criminal matters, but the judge would be in the attitude of not being able to trust implicitly, as he should, counsel in the management and direction of the case.

If the court must verify every move made by the attorney, the court would arouse, by constant inquiry of the client as to whether or not he would agree and acquiesce in matters agreed to by his counsel, a suspicion in the client that the court mistrusted the lawyer in whom the prisoner had placed his confidence, both as to his integrity and his ability to properly look after his interest.

138 Ga. 349, Baldwin.

The court's attention in this case is called also to the fact that the question presented was made in *a motion for new trial.*

6 Ga. App. 403, Hopkins.

In this case the court refers to the fact that the irregularity was without the consent of the defendant.

Clearly the court, in deciding this, were of the opinion that if there was a waiver the results announced would not have followed.

In this case the court's attention is called to the fact that before the adjournment of the court a motion for a discharge was made.

There is nothing in the

67 Ga. 653, Barton,

which prevents the State's position being upheld.

Says the court on page 656 of this opinion—

"The presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury."

In

67 Ga. 510, Bonner,

nothing is decided which militates against our position, but it will be noted that this case presented the question involved through the medium of a *motion for a new trial.*

In

11 Ga. App. 30, Ezzard,

the record itself disclosed a verdict of acquittal.

11 Ga. 630, Mitchum,

says that the attorney represents his client—and is the substitute of his client. Whatever the client may do in the conduct of his case therefore his counsel may do. This, it is true, is merely obiter, but it lays down a proposition running all through the decisions of our Georgia courts.

70 Ga. 264, Durham (4).

Under paragraph 4, in the headnotes, is to be found this language, viz: "The direct waiver of defendant's counsel was binding on him."

Please see authorities cited for this position by the court, as set down on page 267.

39 Ga. 719 (6) Hoye.
This headnote 6 recognizes the right of waiver.

7 Ga. App. 50 (1), Lyons.

In this headnote the court says:

"The defendant in no manner waived either his

own right to be present in person or his right to have his counsel present,'' etc.

Judge Hill, in paragraph 3, page 54, says:

''In this State the defendant can waive *any right guaranteed to him by the law or the Constitution;*'' citing

Wiggins vs. Tyson, 112 Ga. 750.

The question of waiver is involved in

54 Ga. 476, Fannin vs. Durden.

See the latter part of the headnote.

112 Ga. 744 (2), Wiggins vs. Tyson.

See opinion of the court, pages 749 and 750, where the court says:

''One may even waive his right to a trial and enter his plea of guilty and be imprisoned. . . . Mr. Bishop, in his work on criminal law, section 995, declares there are very few exceptions to the rule that a defendant in a cause may waive any right which the law has given him, even a constitutional one. . . . It is declared in section 5 of our Penal Code that a person may waive or renounce what the law has established in his favor, where he does not thereby injure others or affect the public interest.''

9 Ga. App. 553, Schumpert.

In

118 Ga. 24, Hill,

the Supreme Court uses this language:

''We have yet to learn of a case holding that the right (to be present at the rendition of the verdict) cannot be waived *by the accused or his counsel.*''

79 Ga. 785, Daniels vs. Towers,

has already been cited on another question and is a very strong case on the proposition of waiver.

43 Ga. 270, Deen vs. State.

The American and English Encyclopedia of Pleading and Practice, Volume 22, page 929, paragraph C, says: That the greater number of decisions hold that the right to be present at the reception of the verdict may be waived by a defendant in a criminal prosecution, and that there may be constructive as well as actual waiver.

It would not be profitable to cite cases involving analogous propositions, but among others where important rights have been *waived* we will refer the court to the following:

122 Ga. 568, Rhodes vs. State.
81 Ga. 480, Smith.

These cases hold that if witnesses are allowed to give their evidence not under oath, it is evident that the defendant waives the fact that they are not sworn.

The jury were polled and to get this was the main reason why the defendant should have been present.

67 Ga. 653, Barton vs. State.
58 Ga. 513, Smith.

If that be true, then it seems to us that the doctrine of harmless error, as contained in:

13 Ga. App. 444,

would apply. The court in that decision says:

"In considering the right of the accused to be present at every stage of the trial and to have his counsel present, we must not lose sight of the further principle, equally well established, that a new trial will not be granted on an error *which manifestly caused no injury to the accused.* It would be trifling with justice to set aside a verdict clearly and strong-

ly supported by the evidence, solely on the ground that such an error had been committed by the trial judge. To warrant such action by the reviewing court it must be *manifest that the error was prejudicial in character,'' etc.*

See also

135 Ga. 654, Roberson vs. State,
and see the opinion of the court on page 655.

Page 456 U. S. Advance Opinions, Garland vs. Washington, Pamphlet 10.

In view of the foregoing decisions of the Supreme Court of Georgia and the other courts, rendered previous to the decision of the Frank case, can it be said that the decision of the Georgia court constituted a passing of an *ex-post-facto* law in violation of the prohibition contained in article 1, section 10, of the Constitution of the United States, as Frank claims in his application for a writ of habeas corpus?

5. Every question presented by the application for habeas corpus having already been presented by him to the State Court and its decision invoked and its judgment rendered adverse to him, the principle of res adjudicata applies, and for that reason alone the questions cannot be reopened here.

Let us next examine the decisions, which we conceive to be applicable to the foregoing statement and discussion. It is reasonably well settled that where one is indicted and tried under an unconstitutional statute he may, even after final trial, conviction and sentence obtain his discharge on a writ of habeas corpus and he may in like manner be discharged under an indictment based upon a statute repealed prior to the commission of the alleged offense.

Moore vs. Wheeler, Sheriff, 109 Ga. 62; citing

Ex parte Siebold, 100 U. S. 371.
Ex parte Clark, Ibid, 399.
Ex parte Yarbrough, 100 U. S. 651.
Ex parte Royal, 117 U. S. 241.
In re Ziebold, 23 Fed. Reporter 791.
In re Tieloy, 26 Fed. Rept. 611.
In re Ah Jow, 29 Fed. Rept. 181.
In re Payson, 23 Cassas 757, 760.
Ex parte Burnett, 30 Ala. 461.
Ex parte Rollins 80 Va. 314.
Ex parte Rosenblatt, 19 Nevada 439.
Ex parte Mato, 19 Tex. App. 112.
Brown vs. Duffus, 66 Iowa 193.
Fisher vs. McDirr, 1 Gray 2.
Whitcomb's Case, 120 Mass. 118.

The Supreme Court of Georgia is thoroughly in accord with the above proposition.

Griffin vs. Evans, 114 Ga. 65.

And yet the last named court in the case last cited has held that:

> "Where the accused upon the trial brings in question the validity of the statute under which he has been indicted and the point is decided against him, then, of course, it becomes *res adjudicata* and cannot be reviewed collaterally on habeas corpus."
> Griffin vs. Evans, 114 Ga. 67.

In support of the foregoing proposition we cite:

Caverly vs. McOwens, 126 Mass. 222.

In the last headnote in the case of

Glasgow vs. Moyer, Warden,

the case decided as recently as June 7, 1912, the Supreme Court of the United States says:

"A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for habeas corpus proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice."

Mr. Justice McKenna, after discussing several former opinions of the court, uses this language:

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is vested with jurisdiction to try if raised, and its decision can be reviewed like its decisions upon other questions, by writ of error. The principle of the cases is the simple one, that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other, or of fact."

In concluding the opinion, it is said:

"It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict."

Glasgow vs. Moyer, 225 U. S. 420, 430.

It is to be observed that in Glasgow vs. Moyer, this court was dealing with a habeas corpus seeking to discharge a prisoner held under a conviction under a United States statute by a United States court. If dealing with such a conviction it be true that "it would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of

attack upon the judgment after the trial and verdict," how much more forceful does the proposition become when the judgment of conviction was had in a State court and the application for habeas corpus is presented to a United States Court.

> "Federal Courts should not by habeas corpus interfere with the regular course of justice in a State court, unless in cases of peculiar urgency."
>
> Baker vs. Grice, 169 U. S. 284.

> "Except in . . . peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. Ex parte Royall, 117 U. S. 241; Ex parte Fonda, 117 U. S. 516; In re Duncan, 139 U. S. 449; In re Wood, 140 U. S. 278; In re Jugiro, 140 U. S. 291; Cook vs. Hart, 146 U. S. 183; In re Frederich, 149 U. S. 70; New York vs. Eno, 155 U. S. 89; Pepke vs. Cronan, 155 U. S. 100; Bergemann vs. Backer, 157 U. S. 655."
>
> Whitten vs. Tomlinson, 160 U. S. 231, 242.
>
> "Upon the State courts equally with the courts of the union rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof whenever those rights are involved in any suit or proceeding before them."
>
> Robb vs. Connally, 111 U. S. 624.

In American and English Annotated Cases, Volume 14, page 753, there is reported and annotated the case of

The People ex rel. Stead et al. vs. Superior Court.

The original report of this case is:
234 Ill. 186.

We quote from the headnotes:

"When a judgment is approved by the Supreme Court all questions raised by the assignment of error and all questions that might have been so raised, are to be regarded as finally adjudicated against the appellant or plaintiff in error, and the judgment formed must be regarded as free from all error."

6. Where oral evidence is required to show want of jurisdiction, habeas corpus will not discharge the prisoner.

It would make this brief too long to quote at length from the decisions and for that reason we content ourselves with a citation of these cases, but call attention of the court to the interesting note on the question we are now discussing in the report of the case in American and English Annotated Cases, Volume 14, pages 753, 758.

"Where a prisoner is held under a judgment of conviction by a court and the indictment against him states the case and is based on a valid existing law, habeas corpus is not an available remedy, save for want of jurisdiction appearing on the face of the record of the court wherein he was convicted."

Daniels vs. Towers, 79 Ga. 785.
Ex parte John Parker Bronk vs. State of Florida, 43 Fla. 461.
Bray vs. State, 140 Ala. 172.
Ex parte Columbia George, 144 Fed. 985.
Ex parte Stephen, 114 Cal. 278.
In re Clarke, 66 Mass, 320.
Commonwealth ex rel. Davis vs. Lecky, 26 Am. Dec. 37.

and particularly 144 Fed. 985, Ex parte Columbia George.

Applying the principle thus ruled to the facts here, we say that every point now raised by Frank in the application

now before the court is *res adjudicata* and cannot be reviewed collaterally on habeas corpus.

7. The writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

It has been too frequently decided to be now open to question that a writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

Re Lennon, 166 U. S. 552.
Re Ekhart, 166 U. S. 481.
United States vs. Pridgeon, 153 U. S. 48.
Reid vs. Jones, 187 U. S. 153.
Ex parte Bigelow, 113 U. S. 328.
Re Belt, 159 U. S. 40.
Storti vs. Mass., 183 U. S. 138.
Re Tyler, 149 U. S. 164.
Re Cuddy, 139 U. S. 280.
Ex parte Terry, 128 U. S. 289.
Ex parte Kearney, 7 Weat. 38.
Re Schneider, 148 U. S. 162.
Re Debbs, 158 U. S. 564.
Ex parte Watkins, 3 Peters 193.
Ex parte Yarbrough, 110 U. S. 651.
Re Swan, 150 U. S. 637.
Ex parte Fish, 113 U. S. 713.
Dykes vs. Hover, 20 How. 81.
Ex parte Reed, 100 U. S. 13.
Ex parte Parks, 93 U. S. 18.
Ornealas vs. Ruez, 161 U. S. 502.
Markuson vs. Boucher, 175 U. S. 184.
New York vs. Eno, 155 U. S. 89.
Baker vs. Grice, 169 U. S. 284.
Church on Habeas corpus, 2d Ed. Secs. 356, 363.
Felts vs. Murphey, 201 U. S. 123.
Glasco vs. Moyer, 225 U. S. 420.

8. Irregularities, no matter how gross, will not be sufficient to obtain a release on habeas corpus.

It is equally as well settled that mere irregularities however gross in the judgment or the proceedings upon which the judgment was found will not be sufficient to obtain a release on habeas corpus.

15 American and Eng. Encyclopedia of Law, 2d Ed., page 172.
Church on Habeas Corpus, 2d Ed., paragraph 363.
Glasgo vs. Moyer, 225 U. S. 420.

The foregoing proposition holds good even though a constitutional right is invoked:

Ex parte Harding, 120 U. S. 782.
Kohl vs. Lehlbad, 160 U. S.
Church on Habeas Corpus, 2d Ed. 364.

We next come to a discussion of due process of law as applied to the instant case.

9. A discussion of due process of law. The incorporation of the due process clause in the Fourteenth Amendment does not result in an overturning of well-settled principles and established usages prevailing in States, nor to deprive the States of the power to establish other systems of law and procedure, or alter the same at their will.

Confessedly that clause in the 5th amendment has no application here. It is the 14th amendment which makes it applicable. This 14th amendment transferred from the State court to the Federal court the ultimate decision as to the validity of all proceedings affecting life, liberty, or property. This feature of the case was dealt with so forcibly and clearly by the Supreme Court of Georgia that we shall in the main content ourselves with that part of the opinion of Mr. Justice Hill which deals with this phase of the matter.

"Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertable with the older expression 'the law of the land.' The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the state of uncontrolled vengeance." McGehee on Due Process of Law, 1, citing Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. ed. 979). On page 35, this same author says: "Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The Fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process of law to its citizens and to others. It gave to the United States the right to supervise the performance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty and property. But under the amendment the authority of the Federal court is merely to determine whether the State by some official action has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty and property by due process of law rests still with the State, and the

Fourteenth Amendment operates merely as a guaranty additional to the State constitutions against encroachments on the part of the State upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the State and Federal governments to each other and of both governments to the people." [See United States vs. Cruickshank, 92 U. S. 542 (23 L. ed. 588): In re Kemmler, 136 U. S. 436-438 (10 Sup. Ct. 930, 34 L. ed. 519).] "The Federal Supreme Court has again and again declared that when the highest court of a State has acted within its jurisdiction and in accordance with its construction of the State constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. For especially in cases involving procedure, is it true that 'due process of law means law in its regular course of administration through courts of justice.'" McGehee, Due Process of Law, 167, citing Allen vs. Georgia, 166 U. S. 138 (17 Sup. Ct. 525, 41 L. ed. 949), which case is cited with approval in Wilson vs. North Carolina, 169 U. S. 586, 595 (18 Sup. Ct. 435, 42 L. ed. 865). In Rawlins vs. Georgia, 201 U. S. 638 (26 Sup. Ct. 560, 50 L ed. 899, 5 Ann. Cas. 783), it was contended that because many lawyers, preachers, doctors, engineers, firemen and dentists were excluded from jury service in Georgia by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, that the defendant had rights under the Fourteenth Amendment. In delivering the opin-

ion of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the State constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the State court that the local provisions had been complied with. This is a mistake. If the State constitution and laws as construed by the State court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is whether a State could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

At the time this brief is being prepared we have not the benefit of a perusal of the brief to be presented by counsel for appellant to this court, and we can only anticipate his contentions of law, insofar as he presented them on other trials wherein the same points were pressed.

It has been insisted, heretofore, in this case that in order to measure any action of the court in order to see whether it affords due process of law, we are to look to those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors.

Were we to use this as an infallible test it would lead us into error. The fact that a statute denies a trial by jury in cases where a jury trial was required at common law affords no lack of due process of law.

Walker vs. Sauvinet, 92 U. S. 90.
French vs. Barber Asphalt Paving Co., 181 U. S. 324.

It has likewise been held by the Supreme Court of the United States that the words "due process of law" in the Fourteenth amendment do not necessarily require an indict-

ment by a grand jury in prosecution by a State for murder.

Hurtado vs. California, 110 U. S. 516.

The following extract from a unanimous decision of the court delivered by Mr. Chief Justice Fuller is pertinent to the inquiry now under discussion:

> "But the privileges and immunities of citizens of the United States protected by the Fourteenth Amendment are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and 'due process of law' and the 'equal protection of the laws' are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan vs. Mo., 152 U. S. 377, 382.

Again we quote the language of Mr. Chief Justice Fuller speaking for a unanimous bench, as follows:

> "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, re-

quires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. Barbier vs. Connally, 113 U. S. 27, 31."

In re Kemmeler, 136 U. S. 436, 448.

In the recent case of Garland vs. State of Washington, 232 U. S. 642 (34 Sup. Ct. 456), it was held that:

"A conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial granted, was not wanting in the due process of law guaranteed by U. S. Const., Fourteenth Amendment, because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty." In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "Due process of law, this court has held, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers vs. Peck, 199 U. S. 425, 435 (50 L. ed. 256, 26 Sup. Ct. Rep. 87), and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in

the trial court. . . . Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the prosecution of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case [162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097], when he said (page 649): 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'" See Trono vs. United States, 199 U. S. 521 (26 Sup. Ct. 121, 50 L. ed. 292, 4 Ann. Cas. 773). Authorities might be multiplied to the effect that if the State laws as con-

strued by the State courts are not inconsistent with the provisions of the Fourteenth Amendment, that there is no denial of due process of law within the meaning of that provision of the Federal Constitution.—See Record, pages 27, 28 and 29.

Speaking of 'due process of law' the editor of Michie Encyclopedia of U. S. Supreme Court Reports in Volume 5, pages 509 and 510 says:

> " 'The meaning is that it was not intended, by the incorporation of this provision into the constitution of the United States, to overturn well-settled principles and established usages prevailing in the states, nor to deprive the states of the power to establish their own systems of law and procedure, legislate concerning offenses against the same, and to alter the same at pleasure; that it was not intended to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians; that while a process of law not otherwise forbidden must be taken to be due process of law if it can show the sanction of settled usage both in this country and in England, it by no means follows that nothing else can be due process of law. It was the characteristic principle of the common law to draw its inspiration from every fountain of justice, and it is not to be assumed that the sources of its supply have been exhausted. In administering these provisions of the constitution, therefore, the court recognizes the fact that the law is, to a certain extent, a progressive science; that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to prevent the states from amending their laws to suit the changing needs of society or

from adopting such systems of jurisprudence and forms of procedure as they may deem best suited to their needs and purposes.' ''

In support of this view he cites a great number of cases.

We further quote from the same author on page 511 of the same volume:

'' 'Nevertheless, it is stated that the answer to this must be two-fold; namely, that we must examine the constitution itself to see whether the law or the process provided be in conflict with any of its provisions, and if not found to be so, we must look to those settled usages and modes of proceeding existing in the common statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. In other words, a process which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country, though, as previously stated, it by no means follows that nothing else can be due process, for, as we have just seen, the constitutional prohibitions were not intended to restrict either congress or the states to common-law modes and usages, or to deprive the states of the power to adopt, alter or amend their own systems of law and procedure.' ''

In support of the text the following decisions from this court are especially pertinent:

Missouri vs. Lewis, 101 U. S. 22, and specially pages 30 and 31.
Murphey vs. Mass., 177 U. S. 155, and specially the language used on page 163.
West vs. Louisiana, 194 U. S. 259, and the briefs

accompanying the last named case as published in 48 Law Ed. of the Supreme Court, reported on page 965.

The editor of the Columbia Law Review, in the issue of February, 1915, on page 166, has a note on the "presence of the defendant at the rendition of the verdict in felony cases" which is copiously annotated. He treats it absolutely as a question of procedure, and concludes the note in these words:

> "In the absence of exceptional circumstances, therefore, the determination by the State court that the right to be present can be waived would seem to be conclusive of the question, especially since the right is one which does not go to the very essence of criminal procedure."

There is also a discussion in the Central Law Journal, of the issue of January 8, 1915, on page 29, of the contention of appellant that he was deprived of due process of law because he was not present in the court when the verdict was rendered. The contributor of this article, a New York lawyer, cites many pertinent authorities, and argues strongly for the proposition that such contention is untenable.

10. Does the Fourteenth Amendment require the presence of a defendant in Court at the reception of a verdict?

We next will examine such decisions—mainly of the Supreme Court of the United States—as seem most pertinent to a solution of the question which Mr. Justice Lamar, in his opinion allowing the appeal (see record, page 230), says have not been decided by this court.

The first of these is the case of Hopt vs. Utah, decided in 1884, and reported in 110 U. S. 574. It will suffice us to quote the forceful and pertinent comment made by the

contributor to the Central Law Journal, in his article above referred to, to-wit.:

> "See Hurtado vs. California, supra, at page 529. The case of Hopt vs. Utah (1884), 110 U. S. 574, is not an authority for the proposition that the Fourteenth Amendment requires the presence of the defendant in court upon the reception of the verdict. In this case the passive acquiesence of the defendant to the challenging of jurors in his absence was held not to constitute a waiver of a provision in the criminal code of Utah requiring that the defendant 'be personally present at the trial.' Furthermore, at this time Utah was a territory, and the proceeding took place in a court established by Congress under Article 4, Section 3 of the United States Constitution, and not in a State court within the meaning of the Fourteenth Amendment. (Cf. 1 Willoughby on the Constitution, Section 161.)"

And also the criticism of the same case by the editor of the Columbia Law Review:

> "In Hopt v. Utah, the Supreme Court declared that the right to be present at every part of the proceedings in a felony case could not be waived, but this was a decision in regard to the practice in federal courts, and not in reference to the powers of the State under the Fourteenth Amendment. The court has held that the Amendment does not require of the States an indictment by grand jury in a prosecution for a felony, nor does it prevent trial by a jury of eight, nor does it require that a witness be exempt from compulsory self-incrimination, although in a federal proceeding any of these objections might be successfully urged under the constitution. The more recent decisions of the Supreme Court show clearly that in matters of criminal procedure the question of due process is largely left to the courts in the individual States."

"Barton v. State (1881) 67 Ga. 653; Commonwealth v. McCarthy (1895) 163 Mass. 458, in which the court, alluding to the defendant's absence at the time of the reception of the verdict, says at page 460: 'There is no very important reason for requiring the defendant's presence then.'

"Utah at the time was a territory, and the provisions of the Constitution applicable to the federal government in reference to trial by jury and due process, were construed, see Thompson v. Utah (1898) 170 U. S. 343, 349, and not the Fourteenth Amendment which applies only to a State. Moreover, the Supreme Court rendered its decision not in the light of the constitution, but as an appellate court in the enforcement of a provision in the Criminal Code of Utah, which required that the 'defendant must be personally present at the trial.' It is interesting to note that Mr. Justice Harlan, who delivered the opinion in the case, was overruled in most of the subsequent leading cases in regard to his view of the relation of the Fourteenth Amendment to the States."

11. The presence of a defendant in Court at the reception of the verdict does not go to the jurisdiction of the Court.

The courts of most of the States are in harmony holding that the rendition of the verdict in the absence of the defendant—certainly when he waived his presence—in misdemeanors, does not vitiate the trial, and it has likewise been held with practical unanimity that in felonies other than capital the defendant may waive his presence at the moment the verdict is received and that this cannot affect the validity of the conviction.

Warren vs. State, 19 Ark. 214; 68 American Decisions, 214, and the extensive annotations thereto.

State vs. Way, 76 Kan. 928; 14 L. R. A. (N. S.), 603, and the full annotations accompanying the report of the case in the volume last named.

Fite vs. State, 7 Ohio, par 1, p. 180; 28 American Decisions, 626, and the note accompanying the case last cited.

Goar vs. State, 52 Ark. 285; 5 L. R. A. 832, and note accompanying the same.

See also Century Digest, Vol. 14, paragraphs 1469 *et seq.*, where a number of cases are cited supporting the proposition.

The foregoing is not intended to be exhaustive of the cases as to waiver of presence at the time of the rendition of the verdict, but they are perhaps sufficient to show that it is well recognized in nearly all jurisdictions that as to felonies less than capital there are numerous instances where the presence of the defendant may be waived at the moment the verdict is received, and that such absence does not affect the trial. In a number of these cases the point was raised not by habeas corpus but by appeal or writ of error.

It is to be further noted that in many of the cases next above referred to the waiver was made by the prisoner's counsel and the court holding that such waiver was effective. Appellant's position in the present proceeding is this: He was not personally present at the moment the verdict was received, his absence being the result of an express waiver by his counsel. He contends that to receive the verdict under these circumstances was not only erroneous, but that it robbed the court of jurisdiction to sentence him. He thus treats the necessity of the prisoner's presence at the moment of the rendition of the verdict, not as an incident of the trial merely, but as the one thing, the absence of which robs the court of jurisdiction to hold him under the judgment rendered. If, as so clearly appears from the authorities cited above, the prisoner's actual presence at the moment may be legally waived by his counsel in some instances, it is difficult for us to see how the same waiver

regarded in lesser felonies as permissible, absolutely robs the court of jurisdiction when the felony is of a higher grade, to-wit.: capital felony. If the actual presence of the prisoner at the moment the jury returns the verdict in lesser felonies is a mere incident of the trial, what is it in the higher grade of the crime that transforms what in one case is permissible, and at most an irregularity, into such an illegal act as to rob the court of jurisdiction, and to be a denial to the prisoner of due process of law simply because as in the instant case the felony is of a higher grade? This was an indictment for murder. It is permissible in Georgia for a jury to find a defendant charged with murder guilty of a lesser offense, to-wit.: voluntary manslaughter, involuntary manslaughter, or even a misdemeanor. Now, under the almost unbroken line of authorities, if the verdict had been for a misdemeanor, or for a felony less than capital, the absence of the accused at the moment the jury returned the verdict (his presence being waived by his counsel) would not vitiate it; but until the verdict was actually published no one knew whether it would be for a misdemeanor, small felony or capital felony; and yet learned counsel for appellant insists that if the undelivered verdict of the jury should be one of guilty of capital felony that such absence would not only be erroneous, but would render the trial nugatory—would rob the court of jurisdiction, and would be a denial to the prisoner of due process of law. In other words, the identical waiver would in the one case be good, in the other fatal, and this distinction would be merely on account of a difference in the grade of the felony. No such alternative result, we respectfully submit, would ever attach to a substantial right, and this we confidently assert shows conclusively that such a right is a mere incident of the trial, and the absence of the prisoner a mere irregularity at most, and does not go to the want of jurisdiction.

12. Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

This question should turn on the authority of a prisoner's counsel to make waiver for him, and ratification thereof by the prisoner. As to what may be waived, and what may not, and as to whether the court shall proceed on a waiver expressly made by the counsel for the accused, and how far the accused may be bound by the waiver, we insist, are merely matters of procedure which must be determined by the court trying the accused. It is settled in this State that the voluntary absence of the accused at the time the verdict is received will not vitiate the verdict.

Cawthorn vs. State, 119 Ga. 395, 412.
Roberts vs. State, 83 Ga. 167.
Barton vs. State, 67 Ga. 653.

The last named case was cited with approval by the Supreme Court of the United States in Diaz vs. State, 223 U. S. 442. In a well-known Georgia case Mr. Justice Lumpkin uses this language:

> "Assuming his right to be present while the Solicitor-General was arguing the case to the jury, and the accused being then present, though the presiding judge was not actually aware of this fact, the real question is: Did the failure of counsel for the accused to call attention to the court to the fact that the accused was not present constitute a binding waiver by or for him of his undoubted right to be present.
>
> "Tiller vs. State, 96 Ga. 430, 432."

Here the intimation is that counsel for the accused did have the right to make an *express* waiver of his presence.

So the question really turns on the authority of the attorney to bind his client. If, 'he represents his client' if,

'he is the substitute of his client'; if, 'whatever the client may do in the conduct of his cause, therefore, his counsel may do,' then the waiver binds him.

Mitchum vs. State, 11 Ga. 630.

Note the following strong language by Chief Justice Lumpkin, of Georgia:

> "'Was it best in the court to allow the prisoner to be tried by a jury taken from the grand jury list, by consent of both *counsel* for the State and the prisoner? (Italics not by the court.) We think not. And we lay down the broad proposition that a prisoner may waive even a trial itself and be capitally punished upon his own confession of guilt; he may waive any minor right or privilege. The greater including the less.'
>
> "Sarah vs. State, 28 Ga. 576, 581.

This, be it remembered, was a capital case. The waiver dealt with by the judge was a waiver by counsel too.

Messrs. Rosser and Arnold made an express agreement with the trial judge waiving the presence of their client, and this was a waiver by the client himself under the law.

There are many statutory and constitutional rights which Georgia affords to a person accused of crime, and we recall none, and within the limited time at my disposal to run down this question, I have been able to find none, which our courts said might not be waived by counsel for the prisoner. Every person accused of crime is entitled upon demand to a list of the witnesses upon whose testimony the grand jury found the bill; but this is almost invariably waived by defendant's counsel, even in capital cases. And the same is true with reference to copy of indictment. And this is also true in arraignment.

' The prisoner in each instance has the right to make a

statement in his own behalf, and his counsel frequently waives this right, even in capital cases.

It is his right to have the jury polled, but his counsel waives this more frequently than he insists upon it.

Because of these waivers the accused is not denied due process of law, nor is his trial void.

"Penal Code, Sec. 5.
"Bishop Criminal Law, Sec. 995.
"Wiggins vs. Tyson, 112 Ga. 744, 750.
" 'It has also been held that by virtue of a general retainer, an attorney may waive mere informalities and technicalities, and verifications, formal notice of proceedings in a case, or objections to evidence or the manner of taking it.'
"4 Cyc., 939, 940.

13. Frank cannot repudiate the acts of his counsel.

There is another view of this entire matter we wish to submit to the court. Having acted on the suggestion that he did not wish to be personally present, and obtaining the benefit of the agreement and waiver, will Frank not be permitted to repudiate the action of his counsel, the same counsel who subsequently filed a motion for a new trial in his behalf and represented him in that motion before the trial judge, as well as in this court? Frank did not repudiate his counsel. Can he while retaining them repudiate *the act* of his counsel?

We quote from the opinion of Mr. Justice Lewis in the case of Williams vs. State, 107 Ga. 721, 725, 726.

" 'It was held that the agreement in open court that the accusation might be changed from simple larceny to larceny from the house embraced the right of the solicitor to make a good and perfect accusation for the latter offense; and having been made

when the solicitor could have withdrawn the accusation and presented another, it was right to allow it to be consummated by the making of the amendment which was objected to. It is true that was an accusation and not an indictment, but the principle is the same, for the statute prescribes certain means by which such accusations shall be framed; for instance, that they shall be found upon the affidavit of a prosecutor; and if an agreement in open court will dispense with such formalities in the case of an accusation, we do not see why the same rule will not apply to an indictment. We therefore think that even if the alleged defect in this indictment had not been observed until after trial, it was then too late for the defendant to make the objection. But in this case counsel for defendant not only knew of the defect before pleading to the merits, but actually waived it for the accommodation of the defendant himself, consented for the solicitor to fill in the names of the grand jurors, which was accordingly done, and went to trial on his plea of not guilty. When he pleaded, therefore, the record was perfect on its face. As this court has said in the case of Lumpkin vs. State, 87 Ga. 517, 'It is not sound practice for counsel to remain silent, take the chances of acquittal for his client, and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside.' Much less would it be sound practice to allow counsel to waive a defect for his own convenience, take the chances of an acquittal, and then, after conviction, urge such defect as a reason for setting aside the verdict. Hodge vs. State, 39 Ga. 719. The principle cannot be expressed in stronger language than the following from the decision in Sarah vs. State, 28 Ga. 576 (2): 'As the prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt, he may waive every other right or privilege. The greater includes the less, or the whole parts.'

Who was in best position to decide this question, Frank or his counsel? Who could best protect him, his counsel or himself? Was he conducting his trial in person or by trained, efficient and able counsel who had his best interests at heart? Was it not within their province and their right and their duty to make this waiver, and having made it, is it not binding on Frank?

This we again say is the duty of the client and comes within his powers.

> " 'It is not foreign to the subject to say that it is the duty of counsel to guard, by the most scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession. Connected as it is, most intimately, with the administration of justice, it should be protected most vigilantly from falling into popular disrepute. It ought, as I verily believe it does, to command the respect of the wise, and the reverence of the good. Power and place—hereditary wealth—stupidity in high social position, and even genius, pandering to a popular taste for caricature; jealous of the power which it wields upon governments, have laboured to degrade it. Still in this country and in England, if no where else, the bar is the ladder upon which men mount to distinction; the lawyer is the champion of popular rights; the class to which he belongs is more influential than any other; and counsel, yes, feed counsel, is indispensable to a fair and full administration of justice. When learning and character, and practiced skill, and eloquence, and enthusiasm, chastened by discretion, are enlisted in behalf of the litigant, he may rest assured that he holds in his counsel the very best guarantee against all forms of wrong and oppression in the administration of the law. It is true, that he is paid for his services—and what of that? Are not princes and premiers, presidents and priests also paid? One thing never yet was bought with money, and that is the soul-engrossing identification of counsel with his

client. It is gratuitous bestowal of his sympathy, drawing forth the masterly powers of his genius and the rich treasures of his learning, that makes the great lawyer, the honored and influential citizen. The approval of conscience and the respect of good men are his reward; far richer than the stipulated fee of these days, or the honorarium of the Roman advocate. If I thus magnify the office of the counsel, it is for the purpose of saying that its very importance makes indispensable the exclusion of the habit which we now condemn. But I proceed, claiming the indulgence on account of these general remarks, of the critical professional reader, to test the rule we lay down by strictly legal considerations. That rule is, that it is contrary to law for counsel to comment upon facts not proven. He represents his client—he is substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do.'

"Mitchum vs. State, 11 Ga. 615, 629, 630."

14. The Supreme Court of the United States will not grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error.

As bearing directly on the question of whether this court will grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error, we rely upon the case of Duncan vs. Missouri, from which we quoted a moment ago, the proposition contended for being succinctly stated in the syllabus in 152 U. S., page 378, as follows:

"To give this court jurisdiction over a judgment of the highest court of a State, the title, right, privi-

lege or immunity relied on must be specially set up and claimed at the proper time and in the proper way, and the decision must be against it."

We also rely upon the proposition stated in the decision in Rogers vs. Peck, 199 U. S., page 425, to-wit.:

"It is only where fundamental rights, specially secured by the federal constitution, are invaded, that the federal courts will interfere with a State in the administration of its law for the prosecution of crime, and it will not be presumed that if the freedom of a person properly convicted of murder and sentenced to death is improperly restricted that the State authorities will not afford the necessary relief. . . . Due process of law, guaranteed by the Fourteenth Amendment, does not require a State to adopt a particular form of procedure, so long as the accused has had sufficient notice and adequate opportunity to defend himself in the prosecution, and the State may determine, free from federal interference or control, in what courts crime may be prosecuted and by what courts the prosecution may be reviewed."

We invoke the court's consideration of the case of Spencer, 228 U. S. 662, in which the Supreme Court of the United States ruled:

"Federal courts will not grant relief by habeas corpus on constitutional grounds to persons imprisoned under a conviction in a State court, where the petitioners failed to raise such questions either when they were brought up for sentence or on appeal to an intermediate appellate court, or by their unsuccessful petition to the highest tribunal of the State to allow an appeal to that court."

15. The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

We submit that this application for habeas corpus is but an effort to do by indirection what this court has already held Frank could not do directly, i. e., have the Supreme Court of the United States to review the action of the Supreme Court of Georgia in declining to give Frank his liberty for the reasons stated in his application.

As early as 1822 the Supreme Court of the United States in the case of Ex parte Kearney, speaking through Mr. Justice Story (the case being 20 U. S. 38, 42), says:

> "If every party had the right to bring before this court every case in which judgment had passed against him for a crime, or misdemeanor or felony, the courts of justice might be materially delayed and obstructed and in some cases totally frustrated."

If then this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly.

In Ex parte Bigelow, the Supreme Court of the United States, in 113 U. S., page 328, Mr. Justice Miller, delivering the opinion of the court, said:

> "It may be confessed that it is not always easy to determine what matters go to the jurisdiction of the courts, so as to make its action when erroneous a nullity, but the general rule is that when the court has jurisdiction by law of the offense and of the party who is so charged, its judgments are not nullities. There are exceptions to this rule but when they are relied on as foundations for relief in another proceeding they should be clearly found to exist. . . . We are of the opinion that what was done by that court was within its jurisdiction, that the question

thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and decision was the exercise of jurisdiction.''

As early as 1830, in 3d Peters, 28 U. S. 193, the case of Ex parte Tobias Watkins is an authority for the proposition that a decision by the court of a question as to its jurisdiction is itself exercise of its jurisdiction, and should the court in the first instance reach an incorrect conclusion it cannot be treated as void as having been rendered by a court having no jurisdiction. The proposition finds full support in the syllabus on page 193, and again in the argument of Mr. Chief Justice Marshall on page 202.

16. The Supreme Court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this Court should think that ruling error, habeas corpus cannot correct it.

In the case of Ex parte William Belt, the Supreme Court of the United States held:

''Where the court below had jurisdiction to determine the validity of an act which authorized the waiver of a jury, and to decide whether the record of a conviction before a judge without a jury where the prisoner waived trial by jury according to statute was legitimate proof of a first offense, this court cannot review the action of that court in this particular on habeas corpus.''

In the opinion Mr. Chief Justice Fuller says:

''In Hallinger vs. Davis, 146 U. S. 314, 318, it was said by this court: 'Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by State

courts, upholding the validity of such proceeding. Daily vs. State, 4 Ohio St. 57; Dillingham vs. State, 5 Ohio St. 280; People vs. Noll, 20 Cal. 164; State vs. Worden, 46 Conn. 349, 33 Am. Rep. 27; State vs. Albee, 61 N. H. 423, 428, 60 Am. Rep. 325.' And see Edwards vs. State, 45 N. J. L. 419, 423; Ward vs. People, 30 Mich. 116; Connelly vs. State, 60 Ala. 89, 31 Am. Rep. 34; Murphy vs. State, 97 Ind. 579; State vs. Sackett, 39 Minn. 69; Lavery vs. State, 101 Pa. 560; League vs. State, 36 Md. 257, cited by the Court of Appeals.''

Ex parte William Belt, 159 U. S. 97.

The case from which we last quote was habeas corpus. Petitioner was imprisoned under a sentence of the Supreme Court of the District of Columbia. The court decided that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and hence that the judgment of conviction was not void for lack of jurisdiction in the court.

In the case presented here now by appellant we submit that the courts of Georgia had jurisdiction and authority to determine the effect of the previous decisions of the Supreme Court of which the Georgia courts base their rulings on the several matters complained of by Frank in this application. The Supreme Court based their ruling on decisions which under the Code of Georgia have the effect of statutes.

Sec. 6207 (Civil Code of Georgia). ''A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its

decisions shall state distinctly whether it affirms, reverses, or changes such decision.''

17. The action of the Court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly habeas corpus cannot avail to discharge the prisoner.

In a Minnesota case it was held that:

> ''Where upon the trial of an indictment the trial court had jurisdiction of the person of the defendant no inquiry can be had under a habeas corpus as to whether the relator was in fact present or absent when the jury was discharged from the further consideration of the indictment or whether the decision of the court was correct or incorrect.''
>
> 24 Minnesota 87.

Judge Cornell, delivering the opinion of the court, says on page 92:

> ''An error committed in the exercise of a conceded power or jurisdiction is only voidable in its effect, whereas, an act done without any authority or jurisdiction, or in excess of it, is wholly illegal and void. In illustrating this difference Mr. Hurd says (page 133) that to sentence a man to imprisonment in his absence, when the sentence was occasioned by order of the court pronouncing the sentence, would be an irregularity, merely, reviewable alone on error, while sentencing him to imprisonment for a crime punishable by a pecuniary fine only would be illegal, and hence wholly void.''

And on the latter part of page 92 and on page 93:

> ''So in the Tweed case, where it appeared from the record that the judgment was one which, upon the indictment, the court pronouncing it had author-

ity to render under any circumstances. The defects complained of in the case before us are of an entirely different character. No final judgment upon the indictment herein has yet been reached, and, therefore, the district court has never yet been dispossessed of its jurisdiction over it, nor of the person of the accused. In the lawful exercise of this jurisdiction it has the undoubted authority, under certain circumstances, and for certain specified causes (Gen. St. c. 116, Sections 16, 17) to discharge the jury prior to a verdict, and to cause a retrial of the indictment before another jury. It necessarily had the right of determining upon the existence of these circumstances and causes, and, whether it erred or not, its decision thereon was lawful and valid, until reversed on error. This conclusion is fully supported by the case of Wright vs. The State, 5 Ind. 290, which is directly in point on the question under consideration, and we are confident no authority can be found in any way countenancing a contrary doctrine. In that case the jury, having failed to agree upon a verdict prior to the time designated for closing the term, was brought into court and discharged against the defendant's objection. This was held an improper discharge of the jury, and that, under the laws of the State, it precluded a retrial of the indictment before another jury, yet the court refused to discharge the prisoner on habeas corpus, saying that he must apply for relief to the trial court wherein the indictment was pending."

In Hurd on Habeas Corpus, 2d Edition, pages 327 and 328, the author distinguishes between irregularity and illegality, and states the proposition relating to habeas corpus in the following words:

"An *irregularity* is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting some-

thing that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. . . . It is the technical term for every defect in practical proceedings or the mode of conducting an action, or defense as distinguishable from defects in pleadings. *Illegality* is properly, predicable on radical defecs only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes a complete defect in proceedings.

"It would be *irregular* to sentence a man to imprisonment in his absence, where the absence was occasioned by order of the court pronouncing the sentence. It would be *illegal* to sentence him to prison for a crime which was punishable by a pecuniary fine only. Wise rules of procedure established for the regulation of other judicial proceedings are not to be disregarded in that of habeas corpus, when they are applicable. One of these rules is that when a record or process is only *collaterally* brought into question, it cannot be invalidated for error or irregularity.

"It matters not how flagrant the error is. As where a defendant on trial for vagrancy was not allowed to cross examine the prosecuting witnesses, nor to produce witnesses in her own behalf, the court upon habeas corpus could not release the prisoner."

Church on Habeas Corpus. in the 2d Edition, paragraph 255, says:

"Sec. 255. *Discharge of Jury in Absence of Defendant.*—In a case on proceedings by the writ of habeas corpus, where the existence of the facts stated in the return is not denied, where the validity of the indictment is unquestioned, and where the fact is not disputed that the primary court regularly and lawfully acquired jurisdiction over the person

of the accused, who was properly arraigned and put upon trial under the indictment, no inquiry can be had as to whether the relator was in fact present or absent when the jury was discharged from further consideration of the indictment, or whether the decision of the court in discharging them was correct or incorrect. And conceding that the court erred in discharging the jury, and that the alleged error was cognizable in a court of review, it could not be reviewed without the record in the cause was properly before the court of review in such a way as to give it a revisory power under its appellate jurisdiction. But such an error is a mere irregularity, and should not be reviewed under this writ. It does not affect the question of jurisdiction, and where a court has jurisdiction, it is within its power and authority, and is clearly its duty, to entertain, hear, and determine every question that may possibly or legitimately arise during the progress of the trial to final judgment of conviction or acquittal. The fact, therefore, if it be one, that the court has improperly discharged the jury in the enforced absence of the prisoner, does not dispossess the court of its jurisdiction over the cause. If so, any further step or proceeding in the action is wholly nugatory, and the only judgment that can be rendered is one of dismissal for want of jurisdiction, instead of a judgment upon the merits, which alone can furnish any protection to the defendant against another prosecution for the same offense.

"In 1877 Mr. Justice Cornell, of the Supreme Court of Michigan, in a case involving the above principles, quoted the language of the court in People vs. Liscomb, 'whether the determinations of the court upon any or all of the questions were right or wrong did not affect its jurisdiction. In other words, the court had jurisdiction to make wrong as well as right decisions in all the stages of the prosecution, and whether those made were right or wrong

cannot be raised on habeas corpus;' and said: 'No final judgment upon the indictment herein has yet been reached, and therefore the district court has never yet been dispossessed of its jurisdiction over it, nor of the person of the accused. In the lawful exercise of this jurisdiction, it has the undoubted authority, under certain circumstances and for certain specified causes (Gen. Stats., c. 116, secs. 16, 17), to discharge the jury prior to a verdict, and to cause a retrial of the indictment before another jury. It necessarily had the right of determining upon the existence of these circumstances and causes, and whether it erred or not, its decision thereon was lawful and valid, until reversed on error. This conclusion is fully supported by the case of Wright vs. The State, 5 Ind. 290, which is directly in point on the question under consideration, and we are confident no authority can be found in any way countenancing a contrary doctrine. In that case the jury having failed to agree upon a verdict prior to the time designated for closing the term, was brought into court and discharged, against the defendant's objection. This was held an improper discharge of the jury, and that, under the laws of that state, it precluded a retrial of the indictment before another jury, yet the court refused to discharge the prisoner on habeas corpus, saying that he must apply for relief to the trial court wherein the indictment was pending.

"'Fully agreeing with the doctrine of that case upon this point, it follows that no inquiry can be had in this proceeding whether the relator was in fact present or absent when the jury was discharged from the further consideration of the indictment, nor whether the decision of the trial court in discharging them was correct or incorrect, and the prisoner must be remanded.'"

In view of the foregoing authorities we respectfully submit that the Supreme Court of the United States should in this case determine that on a trial for murder in a state court the due process of law clause of the Fourteenth Amendment does not guarantee the right to be present, to the defendant, when the verdict was returned;

And that this court ought to decide that he cannot in any event now be discharged in view of the final judgment refusing a new trial in the case where the defendant did not make the fact of his absence, when the verdict was returned, a ground of the motion nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal constitution.

The above ought to follow more readily, especially since this court has already refused to grant a writ of error in a case where the alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the state where the trial took place.

And certainly habeas corpus is not an available remedy under the facts disclosed.

All of which is respectfully submitted.

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